83-793

No.

In the Supreme Court of the United States

October Term, 1983

WILLIAM E. HUGHES,
Petitioner,

vs.

ALAN S. WHITMER, Superintendent, Missouri State Highway Patrol,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

G. ALEX BARTLETT
Counsel of Record for Petitioner
ROGER K. TOPPINS
BARTLETT, VENTERS, PLETZ & TOPPINS, P.C.
P. O. Box 1586
325 Jefferson Street
Jefferson City, Missouri 65102
Telephone: (314) 634-3440

and

R. JACK GARRETT
R. DAVID RAY
Farmers & Merchants Bank Building
13 Court Square
West Plains, Missouri 65775
Telephone: (417) 256-7142
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-8080

QUESTIONS PRESENTED FOR REVIEW

1. Should the Court of Appeals have remanded the case to the District Court for findings of fact on the First Amendment issues involved in the Highway Patrol's actions in ordering the transfer of Trooper Hughes (the Petitioner), rather than engaging in a *de novo* review of the evidence, when (a) Petitioner had timely raised and preserved the First Amendment issues, (b) those issues specifically were not reached by the District Court, and (c) a determination of the First Amendment issues involves assessing the credibility of witnesses?

2. If *de novo* review of the evidence relating to the First Amendment issues by a reviewing court is proper where the District Court did not reach those issues, were the Highway Patrol's actions in ordering the transfer of Petitioner violative of his First Amendment rights?

3. Should the case be remanded to the District Court for the receipt of further evidence upon the First Amendment issues involved in the ordered transfer of Petitioner?

4. Were the findings of the District Court (a) that the rapidly ordered transfer of Petitioner from Troop G to Troop C was disciplinary in nature, (b) that under state law or regulation Petitioner was therefore entitled to a hearing, and (c) that Petitioner's procedural due process rights would be violated by such transfer without a hearing, clearly erroneous?

5. Did Petitioner have such a legally protectible interest, be it either a property or a liberty interest or a combination thereof, so as to be entitled to a due process hearing with respect to the ordered transfer from Troop G to Troop C under the circumstances here?

PARTIES TO THE PROCEEDINGS

The Petitioner is William E. Hughes, a Trooper in the Missouri State Highway Patrol, who initiated this action as Plaintiff in the District Court.

The Respondent is Alan S. Whitmer who during the proceedings in District Court was the Superintendent of the Missouri State Highway Patrol. While this case was pending in the Court of Appeals Alan S. Whitmer took early retirement and Howard J. Hoffman succeeded him as Superintendent of the Patrol.

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OPINIONS BELOW

The February 11, 1982, Memorandum and Order of the United States District Court for the Western District of Missouri, Central Division (per Judge Scott O. Wright), which granted Petitioner injunctive relief is set forth as Appendix C to this Petition and is reported at 537 F.Supp. 93. The April 2, 1982, Order of the District Court granting Petitioner attorney fees is set forth as Appendix D to this Petition and is unreported. Respondent appealed from each of those orders to the United States Court of Appeals for the Eighth Circuit,

The Opinions (majority opinion by Senior Judge Floyd R. Gibson, Judge John R. Gibson, concurring, reversing the District Court; dissenting opinion by Judge Theodore McMillian) of August 4, 1983, by the United States Court of Appeals for the Eighth Circuit are set forth in Appendix A to this Petition and are reported at 714 F.2d 1407. The Order of September 15, 1983, of the Court of Appeals denying Petitioner's motion for rehearing (Judges Heaney, Bright, McMillian and Fagg *would have granted rehearing* on the First Amendment issue)* is set forth in Appendix B to this petition and is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals was entered August 4, 1983. Petitioner's Motion for Rehearing en banc was denied by order entered September 15, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant portions of the First, Fifth and Fourteenth Amendments to the United States Constitution and of 42 U.S.C. § 1983 are set forth in Appendix F hereto.

Subsection 1 of Section 43.120, Revised Statutes of Missouri, and Section 43.150, Revised Statutes of Missouri, are set forth in their entirety in Appendix F.

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*As of the date of the filing of the Motion for Rehearing, there were eight regular active judges on the United States Court of Appeals for the Eighth Circuit. The Honorable Pasco Bowman became the ninth regular active judge on September 2, 1983.

Missouri Highway Patrol General Order No. V-16-104 issued by the superintendent of the Patrol sets forth the regulations of the Patrol relating to "Complaint Proceedings and Disciplinary Rules." This is set forth at length at the end of and as a part of the District Court Memorandum and Order which is reprinted as Appendix C to this Petition.

STATEMENT OF THE CASE

This is a case for injunctive relief brought by a Missouri State Highway Patrol member, Trooper William E. Hughes, pursuant to 42 U.S.C. §§ 1983, 1985, 1986 and 1988. Petitioner Hughes contends that an order of the then superintendent of the Patrol, Alan S. Whitmer, involuntarily transferring Hughes from Troop G in Willow Springs, Missouri (rural south Missouri), to Troop C in metropolitan St. Louis, Missouri, violated his rights as guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution.

Trooper Hughes has been a member of the Patrol since 1970 and has been stationed throughout his active career in Troop G which is composed of nine essentially rural counties in southern Missouri. Such long tenure at a particular location is normal, and transfers between troops usually only occur by reason of promotion, a member's request or for disciplinary reasons.

Hughes was advised orally on Friday afternoon, October 16, 1981, that he was being permanently transferred to Troop C (the "Siberia" of the Patrol for rural troopers) and that he should report there for duty Monday morning, October 19. Hughes was not notified of any charges against him, either orally or in writing on October 16,

1981. Hughes asked the Troop commander, Capt. McKee, that he be allowed to have his attorney present at Troop headquarters that afternoon, but that request was denied. On Monday morning, October 19, Hughes reported to Troop C, and then took annual leave to try to work matters out within the Patrol without litigation. Failing at that he proceeded to start work at Troop C without moving permanently to the St. Louis area, and his wife and family remained at their home in Willow Springs.

Hughes then filed this action for injunctive relief, and a preliminary injunction hearing was promptly scheduled and heard on November 24 and 25, 1981, before the Honorable Scott O. Wright of the United States District Court for the Western District of Missouri. The parties agreed that the record at that hearing might be considered as the record on the merits of the request for a permanent injunction.

Turning to the facts of the case, what preceded the transfer?

I. The Drug Investigation of a Superior's Son

There was considerable evidence that Hughes' investigation of a superior's son's drug activities raised the ire of that higher ranking officer. The Hughes' investigation was authorized, however, by the Troop Commander, Capt. McKee. Hughes suspected that this higher ranking officer, Lt. Elmore, was leaking information to his son about the ongoing investigation. To verify this, Hughes' partner informed Lt. Elmore of a supposed raid on a house where Elmore's son was thought to be working from with other drug suspects. The following day, the suspects moved out. Hughes testified that as a result of this investigation, people in the Patrol and the Willow Springs

community related threats from Lt. Elmore to the effect that Elmore was out to get Hughes' job. The evidence is undisputed that Lt. Elmore hired his own investigator to follow Hughes. Hughes further testified that he received no cooperation or equipment from the Patrol in assistance of this investigation.[1]

II. The Mountain View Airport Surveillance

Hughes suspected that frequent late-night flights in and out of the Mountain View, Missouri, airport might be related to drug smuggling into the area. The airport is in a rather remote area of the Ozarks, but has a long lighted runway that will accommodate almost any type of plane.[2] He asked his superior, Capt. McKee, for special nighttime surveillance equipment. McKee told Hughes he would get the equipment from patrol headquarters, but cautioned Hughes to be careful as several prominent individuals housed their aircraft at that airport. Despite additional requests from Hughes, the equipment never

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1. Subsequent to the trial before Judge Wright, Tom Elmore and others were arrested, and drug charges were filed against them by the county prosecuting attorney. An undercover agent whose testimony was needed to "make the case" thereafter disappeared, and the drug charges were dropped.

2. Drug traffic in the Ozarks has become a problem of considerable magnitude involving persons in all walks of life (even a state circuit judge in a nearby circuit). A local pilot had indicated to Hughes that he had been offered $30,000 to fly some drugs into Mountain View (Tr. 58). That the Mountain View airport may have been used for drug traffic purposes was *never* challenged by the Patrol command structure - and, in view of the fact that a local veterinarian as well as others seen in the Mountain View area have since been convicted on charges of conspiring to distribute cocaine by bringing it into remote Ozark airports, it would appear that Petitioner certainly acted reasonably with respect to the Mountain View airport. See record in *United States v. Sinor, Depee, Offutt, and Dacquel*, No. LR-CR-83-9(1)(2)(3)(5), E.D. Ark., W. Div.; on appeal by defendants to the Eighth Circuit as Nos. 83-1864 and 83-1872.

came. The suspicious flights, however, stopped shortly after Hughes disclosed his suspicions to his superiors. The evidence also showed that a Missouri state legislator, Danny Staples (a close friend of Lt. Elmore), who kept an airplane at the Mountain View airport, complained to Superintendent Whitmer about the investigation. Whitmer testified that he told Staples he "would make an inquiry into the matter" and would "resolve the problem."

III. The Cover-Up of a Radio Dispatcher's Dereliction of Duty

One night while working the desk, Hughes received a report of an automobile accident. Because of a shortage of personnel that evening, Hughes went to the accident scene and radioed back to the troop's radio dispatcher for a fire truck, ambulance, and wrecker. The dispatcher refused to do it, telling Hughes angrily that he was busy on the phone. The Willow Springs city police eventually dispatched the assistance after hearing Hughes' repeated requests on the radio. Hughes informed Capt. McKee of the dispatcher's recalcitrance and was directed to file a report. The captain took this report to the dispatcher and ordered him to rewrite it. The dispatcher rewrote the report, the new version exonerating himself and blaming Hughes. Hughes was then told by the captain not to report the incident to Patrol headquarters in Jefferson City, Missouri, as such would reflect poorly on the captain's ability to run his troop.

IV. The Cover-Up of the Beating of an Arrestee

Another of Hughes' actions involved questioning the cover-up of an incident of police brutality involving two trooper - a suspect was allegedly beaten while he was handcuffed. A Sgt. Zorsch prepared a report of the in-

cident that stated that the allegation was in some respects *true* and that *one of the troopers had admitted the beating.* Capt. McKee *ordered* Zorsch to rewrite the report so that it stated that the arrestee received his injuries in an accidental "fall". Hughes retrieved Zorsch's initial report from a wastepaper basket believing that the captain and a lieutenant were attempting to cover up the incident because of a threatened civil rights lawsuit against them. Hughes, fearing that his immediate superiors would do nothing with the information, reported the incident to Claud Trieman, a friend who was also a member of the Governor's Crime Commission. Hughes hoped that as a member of this Commission, Trieman could effectuate reform within Troop G by reporting the incident to the upper echelon of the patrol.[3]

V. Hughes' Association With Claud Trieman

Hughes' close friend Claud Trieman, referred to above, was a local industrialist who had assisted in Hughes' unsuccessful efforts to become superintendent of the patrol[4]

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3. The majority opinion of the Court of Appeals dismisses this incident as one where there was no cover-up because Capt. McKee ". . . could have reasonably reached a different conclusion." 714 F.2d at 1423. Subsequent events prove beyond cavil *that there was in fact a cover-up by Capt. McKee and Lt. Hickman* of this beating incident. See, the subsequent court record with respect to the unmasking of this cover-up which is detailed in Appendix I to this Petition.

4. While members of the Patrol are subject to Section 430.60, RSMo, which states that they shall not ". . . electioneer for or against any party ticket, or any candidate for nomination . . .," the Patrol nevertheless has been structured so that by the *same* statute one-half of the Patrol must be Democrats and one-half of the Patrol must be Republicans. In practice this has resulted in a Democratic governor appointing a Democrat out of the ranks as superintendent of the Patrol and a Republican governor appointing a Republican out of the ranks as superintendent. This has resulted in lower ranking officers being immediately "promoted" to the superintendent's colonel rank on a number of occasions in the past.

(Alan Whitmer eventually received the nomination). Hughes testified that his Troop G superiors, Lt. Hickman, Lt. Elmore and Capt. McKee, resented Hughes' political activity because it was "not a normal thing for one in [Hughes'] position as a lowly trooper" to do. Also, the various disciplinary reports prepared by McKee and Hickman (that led to the transfer order) listed Hughes' off-duty association with Trieman[5] as one of the reasons why he should be disciplined.

VI. The Transfer Order

In August 1981, Capt. McKee reported a "problem" within Troop G to Maj. Hoffman at Patrol headquarters. The problem was the allegation concerning Lt. Elmore's son's drug activity (even though McKee had specifically approved Hughes' investigation of young Elmore).

In September 1981, Hoffman learned that legislator Staples had complained to the captain of Troop I about Hughes' investigation of the Mountain View airport. It was at about this time, that Supt. Whitmer told Staples he would "resolve the problem." Shortly thereafter, on about October 4, Lt. Elmore complained of Hughes' investigations and association with Claud Trieman to Supt. Whitmer. Elmore suggested that a solution to the "problems" would be to transfer Hughes to Troop C, generally considered by the rural trooper to be the "Siberia" of the Patrol. (One trooper had been transferred in the recent past from Troop G to Troop C as punishment for being intoxicated while on duty.)

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5. Since the trial of this cause, Mr. Trieman who was a forceful member of the Governor's Crime Commission was killed in an airplane crash (the cause of which has yet to be determined by investigators).

When Elmore returned to his troop he told several troopers that he, Elmore, was having Hughes transferred to Troop C. Lt. Elmore also sought to obtain information that would discredit Hughes, hiring an investigator for this purpose.

Elmore then formally initiated on October 12, 1981, the disciplinary transfer action by making a written recommendation styled:

"Disciplinary action - Trooper W. E. Hughes"

Elmore's report recommended that Hughes be transferred because of Hughes' investigation of the lieutenant's son, because of Hughes' other "seemingly uncontrollable actions over the last few years" that discredited the patrol, and because of Hughes' relationship with Claud Trieman. Lt. Hickman endorsed this report as did Capt. McKee who added that because Hughes had "caused a great deal of turmoil in the Troop . . . with his controversial actions and political maneuvering," he should be transferred "for the benefit of all concerned." The Elmore recommendation and Hickman and McKee endorsements are set forth in Appendix E and were not revealed to Petitioner until the trial before Judge Wright.

Supt. Whitmer "endorsed" and approved the Elmore recommended transfer - stating that because of "Trooper Hughes' actions," "a strong corrective measure must be taken." See Appendix E.

The Rulings Below

Although Hughes challenged the transfer on due process and First Amendment grounds,[6] the District Court

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6. Portions of the original complaint which raise both the due process and First Amendment questions are set forth in Appendix F to this Petition.

permanently enjoined the transfer on due process grounds alone, never reaching the First Amendment issue. The District Court concluded that the transfer was disciplinary and that Missouri State Highway Patrol General Order No. V-16-104 (see Appendix C) makes manifest that

> "any member of the Patrol who is confronted with the threat of disciplinary action is entitled to written notification of the charges against him, a hearing before a disciplinary board and an appeal to the Superintendent of any disciplinary action taken by the board. Where disciplinary action is warranted, a Patrol member might be fined, demoted, transferred, suspended or dismissed."

Hughes v. Whitmer, 537 F.Supp. 93, 95 (W.D. Mo. 1982).

The Court of Appeals reversed in a 2-1 decision, the majority holding that the District Court erred in holding that the dispositive issue was whether Hughes' transfer was disciplinary, stating:

> "This analysis would have been correct if the district court had been sitting in a diversity case governed by Missouri law. But Hughes brought suit under 42 U.S.C. § 1983 (1976) alleging that he was deprived of his fourteenth amendment right to due process under color of state law. The necessary predicate to such a suit is establishing that the plaintiff had a legitimate claim of entitlement to an identifiable property or liberty interest."

Slip op. at 8. This, the court concluded, Hughes did not do.

However, rather than remanding the case for reconsideration by the District Court of Hughes' First Amend-

ment contention, the Court of Appeals majority reviewed the evidence *de novo*, resolved all credibility issues in favor of the command structure of the Patrol, and concluded that Hughes' claim bordered on the "frivolous," and denied the claim.

Judge McMillian, in a 29-page dissent, argued that because the case involved innumerable factual disputes and sensitive First Amendment issues, it should have been remanded to the district court for further findings of fact as the court had done in similar cases recently.

Hughes filed a motion for rehearing by the court en banc which was denied by order of September 15, 1983. The court's order denying the motion for rehearing specifically noted that Circuit Judges Heaney, Bright, McMillian and Fagg would have granted rehearing on Petitioner's motion.[7]

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7. In the footnotes to the Statement of the Case as well as in Appendix I we have set forth certain events or court proceedings that has transpired *since* the trial of this cause which substantiate and lend credence to the testimony of Trooper Hughes and the validity of his "whistle blowing" which the majority opinion of the Court of Appeals completely discounted. The truth of these subsequent events cannot, we believe, be properly questioned. In order, however, that there be no question in this respect, Petitioner hereby requests the Respondent pursuant to the provisions of Rule 36, F.R.Civ.P. to admit the truthfulness of the post trial facts set forth in the foregoing footnotes and also to admit the accuracy of the recounting of the proceedings and the deposition testimony in the *Hicks* case as set forth in Appendix I to this Petition.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because the Court of Appeals in Refusing to Remand the Case to the District Court for Further Findings of Fact on the Petitioner's First Amendment Claim and in Engaging in a De Novo Review of the Facts Relating to That Claim So Far Departs From the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision.

Petitioner's basic contention that a writ of certiorari should issue in this case cannot be described in better terms than was done by Judge McMillian of the Court of Appeals for the Eighth Circuit in dissent:

> "IV. WHY A REMAND IS NECESSARY
>
> The majority cogently points out that '[f]ree speech claims are not to be considered in a vacuum, but must be viewed in light of the circumstances and in context with all relevant conditions existing at the time of the asserted free speech activities.' *Supra* at 22. I could not agree more. This court has repeatedly emphasized that it cannot and will not review sensitive first amendment issues *de novo*. *See, e.g., Nathanson v. United States*, 702 F.2d 162, 165 (8th Cir. 1983); *Brockell v. Norton*, 688 F.2d 588, 593 (8th Cir. 1982). The primary reason why I have explored Hughes' evidence in such detail is to show that there still remains a sharp dispute on the facts. The majority, after a thoughtful reading of the record, has adopted the Patrol's version of the truth, and I have presented Hughes'

version of the truth. *The only way this dispute can be resolved is to have the trier of fact make the necessary credibility determinations and findings of fact.* I must emphasize that this does not mean that I accept Hughes' 'facts' as proven and true. Truth is subjective. In our trial system of dispute resolution, the official 'objective' factual truth is a matter for the trier-of-fact to decide. I would leave the initial task of finding the 'objective' factual truth in this case to the district court. A court of appeals is just not able to make credibility determinations from a faceless record. *See British Airways Board v. Port Authority of New York*, 558 F.2d 75, 82 (2nd Cir. 1977) ('Basic tenets of fairness require that a federal appellate court should not consider an issue involving questions of fact not resolved below.') The great disparity between the majority's reading of the record and my reading of the record highlights this truism." (Emphasis added)

That Judge McMillian was not alone in his view of this case should be of great significance to this Court. Judges Heaney, Bright and Fagg joined Judge McMillian in voting that this case be reheard by the Court *en banc* on the First Amendment question.[8]

As Judge McMillian pointed out in dissent, the Court of Appeals' failure to remand the case conflicts with the practice followed by that court in the very recent cases of *Nathanson v. United States*, 702 F.2d 162 (8th Cir.

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8. At the time of the filing of the motion for rehearing there were eight regular active judges on the Eighth Circuit. On September 2, 1983, the Honorable Pasco Bowman took office to bring the complement on the Eighth Circuit to nine. Therefore, assuming that all of the regular active judges in office (including Judge Bowman) on the Eighth Circuit on September 15 voted on whether to grant rehearing, the vote was a 5-4 vote.

1983), and *Brockell v. Norton*, 688 F.2d 588 (8th Cir. 1982). In those cases the Eighth Circuit, without engaging in tortuous efforts to decide the First Amendment issues raised therein without remand, refused to examine the speech issues *de novo*. *Nathanson*, supra at 165 ("We, of course, cannot decide the case de novo."); *Brockell*, supra at 593-94 ("We affirm the district court's judgment insofar as it dismisses Brockell's procedural due process claims. We remand, however, for determination of his First Amendment claim and further proceedings consistent with this opinion necessary to that determination."). And, as Judge McMillian further pointed out (714 F.2d at 1438), the decision conflicts with the Second Circuit decision in *McFarlane v. Grasso*, 696 F.2d 217 (2nd Cir. 1982).

Why did the majority opinion in the Eighth Circuit fail to follow the Eighth Circuit's own remand policy expressed and utilized in *Brockell*? Why did the majority opinion fail to follow one of the most basic premises of proper judicial administration within the Federal Court system - namely, that with respect to issues not reached by a District Court, the resolution of which are dependent upon contested fact issues and credibility questions, the proper role of a Court of Appeals is to remand the case to the District Court for the entry of findings of facts?[9]

The majority, from a cold record but with absolute and unequivocal deference to the command structure of the Patrol and its witnesses at every juncture, determined

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9. See also, cases holding that proper appellate judicial procedure is to require a remand to the District Court for consideration of issues not decided by the District Court. *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2nd Cir. 1977); *Hettleman v. Bergland*, 642 F.2d 63 (4th Cir. 1981); *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (9th Cir. 1982); and *Markham v. Colonial Mortgage Service Co., Associates, Inc.*, 605 F.2d 566 (D.C. Cir. 1979).

that Petitioner's First Amendment claim, *never* addressed by the District Court because that court held for Petitioner on due process grounds, "border[ed] on the frivolous" and that it would therefore be "unnecessary and would be a waste of judicial resources to remand this case to the district court for a determination of whether the transfer was designed to discipline Hughes for his legitimate investigation of improprieties in Troop 'G,' his surveillance of the Mountain View Airport, or his association with Claud Trieman."

The fallacy of the majority's approach is demonstrated by Judge McMillian's dissent, wherein his review of the evidence, by allowing that the Petitioner and his witnesses *might* be telling the truth, leads inescapably to the conclusion that Petitioner did and does have a substantial, legitimate First Amendment claim. The solution to this tug-of-war, Petitioner submits, was for the court, as the case law uniformly suggests and as the Eighth Circuit had done in *Brockell*, to remand the case to the District Court that *heard* the evidence for a determination.

The inappropriateness and basic unfairness of the Eighth Circuit majority's approach is made clear by a close analysis of some of the factual underpinnings of the case.

The majority, in its *de novo* review of the record, rejected the proposition that Petitioner's corruption-exposing activities (described in the Statement of the Case, supra), qualified the case as a "whistle-blower" case of the ilk of *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979). The majority rejected Petitioner's testimony concerning the cover-up of an arrestee abuse incident. In its *de novo* review, the majority discounted the importance of the incident, stating "Captain McKee could have reasonably reached a different conclusion and was not trying to

cover up something. Lt. Mitchell was unavailable to testify regarding the incident and Captain McKee and Lt. Hickman firmly denied any cover-up of the incident."

The majority opinion in accepting the Patrol's testimony without question, in effect determined that Petitioner's evidence was not credible - a function uniformly and properly held to be within the province of the trial judge who has had the opportunity to observe and judge the credibility of the various witnesses. The District Court in its findings on the due process issues had found the evidence of Petitioner to be credible - *while rejecting contrary testimony of Captain McKee and Lt. Hickman.* Only the trial judge is in a position to make proper credibility determinations on the First Amendment issues. And since the District Court had determined that Captain McKee and Lt. Hickman were not credible on the due process issues, there was a reasonable likelihood that the trial court similarly would have found Captain McKee and Lt. Hickman not to be credible on the First Amendment issues[10] or in a proper situation, if he be in doubt, could have directed further hearing on limited issues.

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10. Subsequent events have *conclusively* demonstrated the lack of credibility of Captain McKee and Lt. Hickman with respect to the prisoner abuse incident. The prisoner involved in this incident filed suit against Captain McKee, Lt. Hickman and the two troopers. See, *Ronald Hicks v. V. P. McKee, et al.*, Case No. 82-3025-CV-S-4, United States District Court for the Western District of Missouri, Southern Division. Counsel for Petitioner have been advised that the two troopers involved in the case maintained their innocence through early discovery stages of that case. Then, faced with the prospect of a Patrol polygraph test, one of the troopers, Archie Dunn, admitted what had transpired. The other trooper (who had been formally charged with the murder of civilians while in service in Vietnam), Bob Lee, maintained his innocence, but failed the polygraph test - and the next day resigned from the Patrol. Dunn was subsequently demoted. Captain McKee and Lt. Hickman shortly thereafter took early retirement. The Missouri Attorney General, realizing there was substance to the prisoner abuse charges, settled the

(Continued on following page)

The Eighth Circuit majority gave lip service to the importance of whistle-blowing activities of public employees, but did not permit the District Court to determine the relevant facts. Instead, the majority rejected the evidence of such by appropriating the District Court's function of making findings where there is conflicting evidence—even though the majority had not had the benefit of having heard and observed the witnesses.

The majority also improperly placed emphasis upon the existence of discord within Troop G. But, as pointed out by the Fifth Circuit in reversing and remanding a denial of relief to police officers in *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982), where police officers sued because they were denied a promotion and the defendants contended that there was such discord that the position was given to someone else:

> "The unrest was a predictable and inevitable result of the request for a hearing [the First Amendment activity]. To hold that the government could permis-

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Footnote continued—

claims against McKee, Hickman and the two troopers by causing approximately $77,000.00 to be paid from the State's tort defense fund to Hicks. In Appendix I we have set forth in detail excerpts from depositions in the *Hicks* case that leave no doubt about the cover-up - e.g., deposition testimony of Lt. Elmore, in relating a conference with Capt. McKee and Lt. Hickman where Elmore was contending the "official" version was incorrect, quotes Lt. Hickman - "Well, if you want to know what I really think happened, . . . I think they beat the shit out of him." See, Appendix I. Trooper Hughes' "whistle-blowing" can hardly be said to be without substance. Had Hughes not raised the matter, it is doubtful that the situation would have ever been exposed. It is clear that the trial judge (a former Missouri prosecuting attorney who stated without equivocation on the record that he had an extremely high respect for the Patrol) had heard enough from Captain McKee and Lt. Hickman to be able to discern a lack of credibility on their parts. And Judge McMillian, with lengthy experience on the state trial bench in Missouri, obviously was cognizant that the ranking officers of the Patrol were not infallible.

> sibly base an employment decision on that result negates the holding that the speech is protected: it is scant comfort indeed to a public employee considering expression to know that he may not be fired for his expression if he may nevertheless be fired for its inevitable result." 669 F.2d at 987.

And it is "scant comfort" to Hughes to know that he has protected First Amendment rights so that when he exercised those rights he cannot be transferred for doing so - when he is left in the position of being transferred because of the unrest the exercise of those rights created! Just as the Fifth Circuit did in *Bowen*, the case should have been remanded for further consideration by the District Court -

> "These questions . . . are pre-eminently factual and are for decision by the trial judge in the first instance." 669 F.2d at 990.

As the Eighth Circuit implicitly recognized less than a year ago in *Brockell*, supra, an issue of the magnitude of Petitioner's first amendment claim deserves the attention of the trier of fact in the first instance. As Judge McMillian stated in dissent:

> "It must first be emphasized that the district court below did not address Hughes' first amendment cause of action. Therefore, we have no pertinent findings of fact with which to review the first amendment issues raised by Hughes' complaint. The majority points out that the determination of whether conduct is protected by the first amendment is a question of law which appellate courts are qualified to answer without regard to a district court's findings of fact. * * * While it may be true that balancing the government's interests against an employee's inter-

> est is a legal determination, it is a determination which must be rooted in historical fact. * * * The present record contains many disputed facts which can only be resolved on the basis of credibility."

Petitioner respectfully suggests that the Eighth Circuit majority's adamant refusal to remand this case to the trier of fact for determinations on issues not addressed below so far departs from the accepted and usual course of judicial proceedings (the accepted and usual course of remand having been applied in a similar case by the same court only a few months before) warrants an exercise of this Court's power of supervision and the issuance of a writ of certiorari to the lower court.

II.

Certiorari Should Be Granted Because It Is Clear From an Examination of the Record That the Transfer Action Was Instigated and "Set Up" by the Troop G Command Structure to Eliminate Hughes' Whistle-Blowing Activities, and Consequently, Such Transfer Action Violated Hughes' First Amendment Rights.

> " 'Those who manage the delicate institutions of government have a special responsibility to respect the law. Justice Louis D. Brandeis put it in classic words in 1928: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . if the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." ' "[11]

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11. Sirica, John J., *To Set The Record Straight - The Break-in, The Tapes, The Conspirators, The Pardon*, pp. 295-296 (W. W. Norton Co., 1979).

The majority opinion of the Eighth Circuit in its deferential treatment and acceptance of the positions advanced by the command structure of the Missouri State Highway Patrol is not unlike that accorded to the FBI in "pre-Watergate" days. In the eyes of many Missouri citizens, including evidently the Judges Gibson, the Missouri State Highway Patrol can do no wrong - and all inferences must be drawn in favor of its command structure. Judges Wright and McMillian, who have been in the "trenches" as a prosecutor and a state trial judge, respectively, recognized that the Patrol is fallible. Just as it was virtually impossible before Watergate for excesses and cover ups within higher levels of the FBI to be questioned, we see reflected at the state level a similar problem in this case.

It is quite clear that there were a number of things amiss in Troop G at Willow Springs - matters that Capt. McKee, Lt. Hickman and Lt. Elmore did not want to be further explored by Hughes. It is further clear that Petitioner Hughes was a "good trooper" (the words of Respondent's counsel at trial), and that if Hughes was to be faulted for any of his actions, the fault was that he didn't close his eyes to some matters that were transpiring. Or as Elmore had put it in one of his earlier personnel evaluation reports of Hughes - "he [Hughes] doesn't seem to understand that the law needs to be bent a little at times." (P. Exh. 24). Plainly and simply Hughes *should* have been commended by the Respondent for having the guts to raise questions about what was going on in Troop G at Willow Springs. Instead, he finds himself being ordered transferred to the "Siberia" of the Patrol on the basis of paperwork (of which he is not made aware) which indicates that the recommended transfer is a "disciplinary action." Certainly Hughes met all of the requirements of *Pickering v. Board of Education*, 391 U.S. 563 (1968) to

show his entitlement to injunctive[12] relief on First Amendment grounds by showing that his constitutionally protected conduct played a "substantial" role in the Patrol's transfer decision. And the Patrol did not show by a preponderance of the evidence that "it would have reached the same decision" on the adverse employee action "in the absence of the protected conduct." *Egger v. Phillips*, 669 F.2d 497, 502 (7th Cir. 1982). (Egger, an FBI agent, challenged his ordered transfer from Indianapolis to Chicago, and it appeared that some discord had occurred in Indianapolis because of misconduct charges Egger had made against another agent; Court of Appeals rejected the District Court's reasoning that the FBI was a paramilitary organization so that different standards applied and the judgment for the defendant was reversed and the case remanded for the District Court to weigh the evidence on the First Amendment issues.)

The result here on the First Amendment issue is, we submit, contrary to a number of cases from other Circuits, as well as of the Eighth Circuit itself. See, e.g., *Ruhlman v. Hankinson*, 461 F.Supp. 145 (W. D. Pa. 1978), affm'd 605 F.2d 1197 (3rd Cir. 1979), cert. denied 445 U.S. 911 (relief granted on First Amendment basis to State Police sergeant who was transferred from Franklin to Erie, Pa., because he counseled other officers to question quota arrest system); *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970) (policeman granted relief with respect to discipline imposed for "going public" with respect to wrongdoing by other officers when the command structure took no action); *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979) (relief granted disciplined employee for writing and distributing a letter which alleged misconduct of other em-

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12. Petitioner Hughes sought injunctive relief, *not* damages, from the Respondent.

ployees); *Bernasconi v. Tempe Elementary School Dt. No. 3*, 548 F.2d 857 (9th Cir. 1977), cert. denied 434 U.S. 825 (enjoining involuntary transfer of teacher from one school to another school); *Rosado v. Santiago*, 562 F.2d 114 (1st Cir. 1977) (relief granted social worker transferred from one town to another after she wrote letter suggesting irregularities in food stamp program); and *Simpson v. Weeks*, 570 F.2d 240 (8th Cir. 1978) (per Lay, J.), cert. denied 443 U.S. 911 (1979) (assignment of Little Rock police officer to a different assignment after officer had talked with attorney who was involved in case involving abuse to criminal defendants - reassignment to original position ordered by court).

III.

Certiorari Should Be Granted Because Petitioner Had a Legally Protectable Right So As to Be Entitled to a Due Process Hearing With Respect to the Ordered Transfer From Troop G to Troop C.

The District Court properly viewed the ordered transfer as punitive in nature and interpreted state law and regulations as requiring a hearing in such instance.[13] And Major (now Superintendent) Hoffman testified:

"Q. Okay. Now on a disciplinary move - if you actually come out and call it a disciplinary move, then there is a right to a hearing, a right to re-

13. A full argument on the interpretation of Missouri law and the Patrol General Order should properly await the Brief on the merits. Suffice it to say at this juncture that (1) the interpretation by the District Court was a reasonable and proper interpretation of Missouri law and regulations and (2) the Court of Appeals departed from established practice by not deferring to the District Judge on an interpretation of Missouri law [see, e.g., *Jump v. Goldenhersh*, 619 F.2d 11 (8th Cir. 1980)].

view, a number of rights that the subject man has; isn't that true, Major?

A. Yes, sir." (Tr. 235)[14]

Here, the report initiating the transfer order was entitled "Disciplinary Action," all of the top command structure at Troop G had complained of the "actions" of Hughes, and the Respondent concluded in his approval of the recommended transfer that because of "Trooper Hughes' actions . . . a strong corrective measure must be taken." (Appendix E). One can only conclude that the action was punitive in nature.

Whether the interests of Petitioner be characterized as a property interest or a liberty interest, or whether emphasis be placed upon the "stigma" arising from the situation, Petitioner had such a legally protectable interest as to be entitled as a matter of procedural due process to at least a rudimentary hearing in connection with the involuntary transfer from Troop G to Troop C. If an inmate in a Pennsylvania penitentiary has a "liberty" interest which invokes due process considerations so that he may not be transferred from the general prison population to administrative segregation without a "hearing" of some type - *Hewitt v. Helms*, 103 S.Ct. 864 (1983) - then surely Hughes has a cognizable right under the circumstances here which would invoke a due process hearing requirement in connection with the ordered transfer. All of the following factors, viewed in a totality, gave rise to such a right:

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14. The Patrol practice of granting a board hearing when a disciplinary or punitive transfer is proposed is reflected in the proceedings with respect to Cpl. Eddie Hill which are set forth in Appendix H to this Petition.

1. The transfer was not made to remedy any imbalance between the troop strengths.

2. Petitioner's special skills were not needed at Troop C.

3. Troop assignments within the Missouri State Highway Patrol are generally of a long term nature, and changes are usually only made when promotions are involved, a move is requested by the member, or for disciplinary reasons.

4. The transfer was ordered to the "Siberia" of the Patrol insofar as rural troopers such as Petitioner were concerned.

5. A rapid, involuntary transfer, as here, is generally regarded by other members of the Patrol as disciplinary in nature so that a stigma attaches by means of such transfer.

6. The order transferring Petitioner was disseminated by the State Highway Patrol command structure.

7. Persons in the Patrol, others engaged in law enforcement and persons from the local community testified that the move was considered as disciplinary with a stigma attached - i.e., that Hughes had done something wrong and was being punished.

8. Established practice within the Patrol is for there to be a board hearing if a disciplinary transfer is imposed, and a member of the Patrol comes to reasonably expect that.

9. Petitioner Hughes had an established home in Willow Springs which he and his wife owned, his

children have been in High School there, and the move to Troop C would result in financial losses to Petitioner.

10. For one who has aspired to higher positions within the Patrol, the stigma attached to an involuntary transfer such as here is particularly onerous.

The totality of these circumstances reflects an interest of Hughes which is legally cognizable so that the due process clause requires, as the District Court found, that Petitioner be granted a hearing; and having not been afforded such a hearing, Petitioner may not be properly ordered transferred and therefore be arbitrarily deprived of such legally cognizable interest. *Perry v. Sinderman*, 408 U.S. 593 (1972); and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). And see, *Bottcher v. State of Florida Department of Agriculture and Consumer Services*, 361 F.Supp. 1123 (N. D. Fla. 1973), aff'd 503 F.2d 1401 (5th Cir. 1974), reh. denied 510 F.2d 384 (5th Cir. 1975) (assignment of state employee from a position at one laboratory to another laboratory coupled with stigma attached thereto held to be an interest subject to procedural due process protections).

CONCLUSION

One cannot, we submit, review the facts of this case without coming to the conclusions that it raises substantial First Amendment and procedural due process questions, but also, and perhaps even more importantly in the context of why this case should be heard by the Supreme Court, it raises the questions of the proper procedures that a Court of Appeals should follow in deciding such issues when they were not reached by the District Court, the standard of review to be followed by a Court of Appeals in the review of such issues, and the deference that should be paid to the District Court on disputed fact issues and the interpretation of state law. Petitioner respectfully requests that a Writ of Certiorari be issued and that this cause be heard by the Supreme Court.

G. ALEX BARTLETT
Counsel of Record for Petitioner
ROGER K. TOPPINS
BARTLETT, VENTERS, PLETZ & TOPPINS, P.C.
P. O. Box 1586
325 Jefferson Street
Jefferson City, Missouri 65102
Telephone: (314) 634-3440

and

R. JACK GARRETT
R. DAVID RAY
Farmers & Merchants Bank Building
13 Court Square
West Plains, Missouri 65775
Telephone: (417) 256-7142
Attorneys for Petitioner